

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 * * *

4 MICHAEL RENO, *et al.*,

5 Plaintiffs,

6 v.

7 WESTERN CAB COMPANY, *et al.*,

8 Defendants.

Case No. 2:18-cv-00840-APG-BNW

ORDER

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10 Before the Court is Plaintiff's objection to the Court's order imposing sanctions on

11 Defendant Western Cab (ECF No. 380) for failing to appear at its 30(b)(6) deposition. ECF

12 No. 384. The Court will construe the objection as a motion for reconsideration. The order at ECF

13 No. 380 precluded Western Cab from contesting the accuracy of records, contesting the

14 application of an average fuel cost in records that fail to include a fuel-cost amount, disputing

15 that each plaintiff is owed fuel costs that they paid from their tips, and contesting liability for

16 each plaintiff for whom it has not produced records. ECF No. 380 at 6–7. Said order, however,

17 neglected to include that Western Cab would be given one *final* opportunity to be deposed on the

18 remaining two deposition topics, topics seven and nine. Therefore, the Court vacates its prior

19 order at ECF No. 380 and enters this new order.

20 **I. BACKGROUND**

21 As relevant to this Order, Plaintiffs seek sanctions under Federal Rule of Civil Procedure

22 37(b)(2) for violating the Court's discovery orders. *Id.*¹ They ask the Court to preclude Western

23 Cab from contesting the accuracy of records, contesting the application of an average fuel cost in

24 records that fail to include a fuel-cost amount, disputing that each plaintiff is owed fuel costs that

25 they paid from their tips, contesting liability for each plaintiff for whom it has not produced

26 records, presenting and proving any affirmative defenses, and denying that it engaged in a

27 ¹ Plaintiffs also seek sanctions under other rules. Given that the Court will impose sanctions

28 under Rule 37(b)(2), it will not discuss the remaining grounds upon which Plaintiffs move for

sanctions.

1 “willful” violation of the Fair Labor Standards Act (“FLSA”). *Id.* at 12–13. Plaintiffs also
2 request a sanction for costs and fees arising from Western Cab’s failure to appear. *Id.* at 13.

3 Though the motion was initially unopposed, ECF No. 373, Defendants ultimately filed an
4 opposition, albeit after the deadline. ECF No. 375. Plaintiffs then moved to strike the untimely
5 filed opposition and also filed a reply. ECF Nos. 377, 378. As explained below, the Court will
6 exercise its discretion and consider Defendants’ opposition, but only to the extent that it applies
7 to Western Cab.

8 After considering the five-factor analysis for awarding sanctions, the Court will issue
9 preclusion sanctions closely related to topics that would have been covered in Western Cab’s
10 deposition. The Court will also award Plaintiffs costs and fees related to the taking of Western
11 Cab’s deposition and bringing the underlying motion because Western Cab failed to establish
12 that its failure was substantially justified. But the Court will not preclude Western Cab from
13 denying that it engaged in a willful violation of the FLSA or from presenting any affirmative
14 defenses, as these sanctions are tantamount to exacting a default judgment against Western Cab.
15 Instead, the Court will allow Plaintiffs to depose Western Cab on these two topics.

16 **II. ANALYSIS**

17 **A. Defendants’ Untimely Opposition**

18 First, the Court must decide whether to consider Defendant Western Cab’s opposition at
19 ECF No. 375. By way of background, Plaintiffs filed two motions for sanctions. The first motion
20 sought sanctions for Defendant Awad’s failure to attend his deposition. ECF No. 370. This Court
21 already entered an order to that motion. *See* ECF No. 374. The second motion, which is currently
22 before the Court, seeks sanctions for Defendant Western Cab’s 30(b)(6) witness’s failure to
23 attend the deposition. The opposition to this motion attempts to justify why neither Defendants
24 Awad nor Western Cab attended the depositions. To the extent that the opposition at ECF
25 No. 375 attempts to respond to both motions for sanctions, the Court will not consider the
26 opposition insofar as it relates to Defendant Awad, as the Court has already resolved Plaintiffs’
27 request for sanctions regarding this defendant. ECF No. 374.

1 Next, the opposition at ECF No. 375 was filed two days late. The opposition did not
 2 address the fact that it was late or establish excusable neglect (as it must) for its consideration.
 3 FED. R. CIV. P. 6(b)(1)(B); *see generally* ECF No. 375. This is not the first time that Defendants
 4 have untimely filed documents. *See, e.g.*, ECF Nos. 140, 362 at 1, 368 at 1. Nonetheless, the
 5 Court exercises its discretion to consider the opposition and resolve the motion on the merits. As
 6 such, the Court denies Plaintiffs’ Motion to Strike.

7 **B. Western Cab’s Failure to Attend its Deposition**

8 In their motion, Plaintiffs seek sanctions under several rules, including Federal Rule of
 9 Civil Procedure 37(b)(2) for Western Cab’s failure to attend its deposition, which violates the
 10 Court’s discovery orders. ECF No. 371 at 12–13. Rule 37(b)(2)(A)(ii) allows a court to sanction
 11 a party who violates a discovery order by “prohibiting the disobedient party from supporting or
 12 opposing designated claims or defenses.” In addition, Rule 37(b)(2)(C) states that the court must
 13 order the disobedient party “to pay the reasonable expenses, including attorney’s fees, caused by
 14 the failure, unless the failure was substantially justified.”

15 The Court considers the five-factor test that is employed when determining whether to
 16 issue sanctions: (1) the public’s interest in expeditious resolution of litigation, (2) the court’s
 17 need to manage its docket, (3) the risk of prejudice to the party seeking sanctions, (4) the public
 18 policy favoring disposition of cases on their merits, and (5) the availability of less-drastic
 19 sanctions. *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002). Sanctions
 20 under Rule 37(b)(2) may be appropriate when three factors strongly favor the imposition of such
 21 sanctions. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002). Here, the public’s interest in
 22 the expeditious resolution of litigation, the court’s need to manage its docket, and the risk of
 23 prejudice to the party seeking sanctions weigh in favor of imposing Plaintiffs’ requested
 24 sanctions. *See id.*

25 The Court begins by pointing out that it ordered the parties nearly *ten months* ago to meet
 26 and confer to determine a date for the deposition. ECF No. 340. Since then, the Court ordered the
 27 parties *twice more* to meet and confer to, again, determine a mutually agreeable time for the
 28

1 deposition. ECF Nos. 362, 368. The lack of cooperation between the parties and this Court's
2 frustration with the fact that the deposition had not taken place led to an order prescribing a
3 meticulous method for the parties to agree on a deposition date. ECF No. 368 at 2. In such order,
4 the Court warned that:

5 the parties should take note that this Court is astounded by their well-established
6 pattern of unprofessionalism toward each other and, ***should another motion be***
7 ***filed based on their inability to communicate, this Court is prepared to issue an***
8 ***Order to Show Cause why they should not be sanctioned accordingly.***

8 *Id.* (emphasis added).

9 In addition, a prior order admonished the parties to make the deposition a scheduling
10 priority and warned that sanctions would follow if they did not comply. ECF No. 362 at 2–3.

11 Rule 37 tells all lawyers and their clients that preclusion sanctions are possible if they
12 violate discovery orders and that “direct warnings or other circumstances may make it clear that
13 [sanctions are] a real risk of continued violation in the particular case.” *Valley Engineers Inc. v.*
14 *Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998); FED. R. CIV. P. 37(b)(2)(A)(ii). The Court
15 warned the parties many times that sanctions may issue if they did not make the taking of the
16 deposition a priority or if they had to seek further court intervention based on the parties'
17 inability to communicate. ECF No. 362 at 2–3; ECF No. 368 at 2. Based on the Court's orders
18 and the parties' prior behavior as a whole—coupled with the fact that discovery closed on
19 February 12, 2024—Western Cab knew that it was in jeopardy of facing sanctions for failing to
20 appear at its deposition and then failing to communicate with Plaintiffs for over two months.
21 *Valley Engineers Inc.*, 158 F.3d at 1057 (finding that Defendant knew it could be subject to
22 dismissal sanctions after the Court threatened sanctions for anything that would “frustrate the
23 speedy disposition of the case”); *Tacori Enterprises v. Beverly Jewellery Co.*, 253 F.R.D. 577,
24 580 (C.D. Cal. 2008) (precluding Defendant from presenting evidence regarding deposition
25 topics after violating court's order to complete 30(b)(6) deposition).

26 In its opposition, Western Cab states that no sanctions should issue because defense
27 counsel and his daughter became ill mid-December, his daughter was hospitalized in January,

1 and his computer was stolen from his car in late January. Although the Court is sympathetic to
2 such issues, defense counsel's inaction for such an extended period is problematic. As an
3 attorney, defense counsel is held to a high standard of professionalism. *See, e.g.*, MODEL RULES
4 OF PROF'L CONDUCT 1.1, 1.2 (Competence, Diligence). And the most significant events—his
5 daughter's hospitalization and the break-in of his car—did not occur until January 17, 2024, and
6 January 24, 2024, which was *after* Western Cab's scheduled deposition on January 15, 2024.
7 ECF Nos. 375 at 5, 376 at 4. It is likely counsel's daughter was sick on January 15, 2025, but
8 Defense counsel had options at his disposal to communicate to Plaintiffs and/or the Court that
9 Western Cab was unavailable for its deposition rather than choosing not to respond. The failure
10 to respond is further magnified when considering defense counsel did not respond to Plaintiffs
11 for nearly two months. In addition, this is not the first time that defense counsel has pointed to
12 issues in his personal life as justification for not complying with his professional duties. Such
13 behavior is simply not acceptable.

14 In terms of the five-factor test for issuing sanctions, the Court finds that three factors
15 weigh heavily in favor of awarding sanctions: (1) the public's interest in the expeditious
16 resolution of litigation, (2) the court's need to manage its docket, and (3) the risk of prejudice to
17 the party seeking sanctions. *See Rio Props, Inc.*, 284 F.3d at 1022; *Pagtalunan*, 291 F.3d at 643.

18 *The public's interest in the expeditious resolution on litigation.* First, this case has been
19 going on since 2018. ECF No. 362 at 2. Despite this Court's orders over several months, Western
20 Cab has not been deposed. The failure to conduct the deposition continues to delay this case.

21 *The Court's need to manage its docket.* Second, this deposition has been subject to *three*
22 motions to compel and various requests for sanctions. *See, e.g.*, ECF Nos. 196, 362, 363, 371. To
23 be sure, the Court has had to craft orders bordering on the ridiculous for the parties to figure out
24 a time and date for this deposition to take place. *See, e.g.*, ECF No. 368. The Court cannot
25 relentlessly address this issue.

26 *The risk of prejudice to the party seeking sanctions.* Finally, at this juncture, the Court
27 does not believe that Western Cab has any intention of being deposed. Plus, the deadline for
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1 taking the depositions—February 12, 2024—has already passed and Defendants have not asked
2 for an extension. *See* ECF No. 368 at 1. In turn, the inability to depose Western Cab prejudices
3 Plaintiffs given that its testimony regarding the hours Plaintiffs worked, Plaintiffs’ wages after
4 deducting gas payments, the cost of gas Plaintiffs paid from their tips, the accuracy of the
5 records, and the existence of a gas policy all bear on crucial elements of Plaintiffs’ claims. ECF
6 No. 371 at 6–8. In failing to appear for its deposition, Western Cab has prejudiced Plaintiffs by
7 preventing them from preparing for their case. *In re Heritage Bond Litig.*, 223 F.R.D. 527, 530
8 (C.D. Cal. 2004).

9 The facts above weigh in favor of imposing these sanctions. *See Pagtalunan*, 291 F.3d at
10 643. Although less-drastic sanctions are available, the Court has awarded fees and costs in the
11 past for violating other discovery orders. *See, e.g.*, ECF Nos. 304, 317, 354. And the Court may,
12 in deciding a proper sanction, “properly consider all of a party’s discovery misconduct. . .
13 including conduct which has been the subject of earlier sanctions.” *Payne v. Exxon Corp.*, 121
14 F.3d 503, 508 (9th Cir.1997). The Court fears that should it award the less-drastic sanction of
15 fees, it may only be kicking the can down the road.

16 Given the Court’s prior orders, the parties’ history, and Western Cab’s present conduct,
17 these are appropriate sanctions that are reasonably related to the subject of discovery that was
18 frustrated by the sanctionable conduct. *See Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir.
19 2001). Because Western Cab failed to establish that its failure was substantially justified, the
20 Court will also award Plaintiffs costs related to the taking of Western Cab’s deposition and
21 bringing the underlying motion.

22 The Court will not, however, preclude Western Cab from denying that it engaged in a
23 willful violation of the FLSA or from asserting any affirmative defenses. As stated above, such
24 sanctions are too harsh and would equate to the imposition of a default judgement. Instead, the
25 Court will allow Plaintiffs to depose Western Cab on these two topics.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Strike (ECF No. 377) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for reconsideration (ECF No. 384) is GRANTED.

1. Contesting the accuracy of records produced in this case regarding the plaintiffs;
2. Contesting the application of an average fuel-cost amount for any plaintiff's shift in which the records fail to include a fuel-cost amount paid by said plaintiff;
3. Disputing that each plaintiff is owed an amount equal to the fuel costs paid out of their tips; and
4. Contesting liability to each plaintiff for whom it has not produced records, for an amount equal to the average amount owed under the FLSA to plaintiffs for whom records were produced.

IT IS FURTHER ORDERED that pursuant to Rule 37(b)(2)(C), Western Cab is ordered to pay the costs of arranging the court reporter and legal videographer services, the fees properly incurred in preparing and appearing for Western Cab's deposition, and the fees properly incurred in bringing this motion (ECF No. 371).

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1 **IT IS FURTHER ORDERED** that the parties shall rearrange their schedules to ensure
2 the deposition is completed by March 31, 2024.

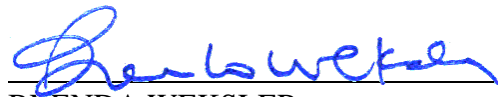
3 **IT IS FURTHER ORDERED** that the parties shall meet and confer by March 15, 2024,
4 to determine a mutually agreeable date, time, and location for the deposition.

5 **IT IS FURTHER ORDERED** that any party failing to make itself available to meet and
6 confer may be sanctioned.

7 **IT IS FURTHER ORDERED** that the deposition shall last no more than four hours and
8 shall be restricted to topics seven and nine, which relate to Western Cab's affirmative defenses
9 and whether it engaged in a willful violation of the Fair Labor Standards Act.

10 **IT IS FURTHER ORDERED** that Western Cab's failure to attend the deposition on the
11 agreed-upon date, which must occur by March 31, 2024, may result in the imposition of all
12 sanctions Plaintiffs previously sought. *See* ECF No. 371.

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16 DATED this 8th day of March 2024.

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18 
19 BREND A WEKSLER
20 UNITED STATES MAGISTRATE JUDGE
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